Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1551

In The

Supreme Court of the United States

October Term, 1985

ALAN J. KARCHER, et al.
Appellants,

vs.

JEFFREY, MAY, individually, et al.
Appellees.

On Appeal from the United States Court of Appeals For the Third Circuit

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether Alan J. Karcher and/or Carmen A. Orechio, in their capacities as members of a prior Legislature, retain standing to appeal the judgment of the United States Court of Appeals for the Third Circuit when the only party with standing to prosecute this appeal, the current 202nd Legislature, has directed that the appeal be withdrawn?

2. Whether the Court of Appeals correctly or properly affirmed that the New Jersey Moment of Silence Law violates the Establishment Clause of the First Amendment when incontrovertible facts, including the plain language of the statute, its legislative history and the historical background from which it emanated, all demonstrate that the purpose of the statute was to promote religion in the public schools?

3. Whether the Court of Appeals properly applied the "clearly erroneous" standard of review dictated by Fed. R. Civ. P. 52(a) in upholding the District Court's factual finding of no secular purpose and in declaring unconstitutional New Jersey's Moment of Silence Law?

PARTIES TO THE PROCEEDING

Appellants: Alan Karcher and Carmen Orechio intervened as party defendants in this action solely in their representa- tive capacities as Speaker of the New Jersey General Assembly and President of the New Jersey Senate, respectively. At the time that they intervened as party defendants, they were members of the 200th Legislature. As of that date, Messrs. Karcher and Orechio continued as Speaker of the General Assembly and President of the Senate for the 201st Legislature.

On January 14, 1986 at 12:00 noon the 201st Legislature adjourned and the 202nd Legislature convened. Messrs. Karcher and Orechio no longer held their posts as leaders of their respective houses. The new Legislature elected, by majority, Charles Hardwick to represent them as Speaker of the General Assembly and John Russo to represent them as President of the New Jersey Senate.

The appeal now before this Court had been authorized by the prior Legisla- ture, the 201st. However, by letters dated April 21, 1986 and April 29, 1986 from the Honorable Charles Hardwick and from Leon Sokol, counsel to the Democratic majority in the Senate speaking on behalf of their respective bodies, directed that the appeal be withdrawn. Both the New Jersey Senate and the General Assembly determined that the Legislature no longer desired to prosecute this appeal. These sentiments were communicated to the Clerk of the Supreme Court of the United States by

William Robertson, Esquire who apparently takes the position that he now represents Messrs. Karcher and Orechio individually.

Saul Cooperman, the Commissioner of the New Jersey Department of Education, the New Jersey Department of Education, the Edison Township Board of Education and the Old Bridge Township Board of Education were all named as defendants in the original complaint, but took no active role in the proceedings before either the District Court or the Court of Appeals.

Appellees: In addition to Jeffrey May, individually, Jean Ross, as natural parent of Damon Ross, an infant, and Jean Ross, individually; Bonnie Schorske, as natural parent of Mark Tulloss, an infant, and Bonnie Schorske, individually; Brenda Butler, individually, and Gary Drew, individually, were appellees in the court of appeals.

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MOTION TO DISMISS OR AFFIRM

Appellees respectfully move, in accordance with Rule 16.1 (c) and (d) of this Court's rules, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals for the Third Circuit on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

As we show, this appeal is non-justicable for two reasons: (1) the appellant lacks standing to process this appeal; and (2) the questions on which the decision of this caase depend are so unsubstantial as not to require briefs on the merits or oral argument in their resolution. The judgment below was clearly correct. The Court of Appeals majority did no more than apply well-

established doctrine concerning the Establishment Clause to undisputed facts.

The appellant's jurisdictional statement sets forth the statute and constitutional provisions involved at p.2. The appellant's summary of the facts of the case and decisions below are summarized on p.3-7 of the Jurisdictional Statement. These matters need not be included at this time.

A. BECAUSE THE ONLY PARTY WITH STANDING TO BRING THE CURRENT APPEAL HAS DETERMINED TO WITHDRAW THE APPEAL, THERE IS NO CASE OR CONTROVERSY AND THE APPEAL MUST BE DISMISSED FOR WANT OF JURISDICTION.

By letter dated May 6, 1986, to the Clerk of the Supreme Court, counsel who

filed the jurisdictional statement in this matter apprised the Court that the current New Jersey Assembly and Senate "do not join in and are not appellants in this matter." (Respondent's App. 2a). Respondents submit that the New Jersey legislature, as Intervenor, was the sole agency who could have processed this appeal. The legislature's withdrawal therefore leaves this Court without a justiciable case or controversy, dictating dismissal of the appeal for lack of jurisdiction. See Diamond v. Charles, 106 S.Ct. 1697, 97 L.Ed. 2d 48 (1986). This conclusion flows from a careful examination of the history of this litigation.

When the instant suit was first brought against the N.J. Department of Education, as the agency which would

implement New Jersey's moment of silence law, the State's Attorney General, as chief law enforcement officer, refused to defend the law. This highly unusual position was prompted by the Attorney General's determination that New Jersey's moment of silence measure was so patently unconstitutional that he could not in good conscience defend it. (See district court opinion, Appellant's App. at 66a). At that point, the New Jersey legislature, through its presiding officers acting in their official capacities, intervened to defend the moment of silence law.

The hearing on the legislature's motion to intervene makes unmistakably clear that the party in interest who was accorded intervenor status was the New Jersey legislature. (The full

transcript of that January 18, 1983 hearing is reproduced in Respondent's Appendix attached at pp. 11a-27a). Counsel for intervenor began the hearing by announcing his appearance "for the General Assembly and Senate, the intervenors." (R. App. 12a). He then explained that he was acting on behalf of both the presiding officers of the Assembly and Senate, Mr. Karcher and Mr. Orechio respectively. (R. App. 12a).

The ensuing discussion at the hearing on intervention made plain that Messrs. Karcher and Orechio were acting purely in their official capacities as representatives of the legislature. After the district court judge's query whether Messrs. Karcher and Orechio would have standing as individuals, the following exchange occurred:

> Mr. Marinari (counsel for intervenor): As the presiding officers of both houses, they are empowered by the rules of both houses to represent the house in litigation.
>
> The court: They are in a representative capacity?
>
> Mr. Marinari: That is correct. (R. App. 15a).

When counsel for plaintiffs commented that the Assembly and Senate would be proper parties, counsel for intervenor replied:

> That is who I am representing. The order says Alan J. Karcher in representative capacity as Speaker of the New Jersey General Assembly, the New Jersey General Assembly, and the same for the Senate and its body. (R. App. 21a; see also Appellant's App. at 66a where the district court opinion noted that the New Jersey Assembly and Senate had intervened as defendants, and see Appellant's Jurisdictional Statement at p. 5).

The above-described intervention by the state legislature through its presiding

officers was entirely consistent with this Court's view of "officer-capacity suits" as a pleading device to bring into a litigation "the entity of which an officer is an agent." Kentucky v. Graham, 105 S. Ct. 3099, 3105, 87 L.Ed.2d 114, 121 (1985); Bender v. Williamsport Area School District, 106 S.Ct. 1326, 1332, 89 L.Ed. 2d 501, 512-513 (1986).

The intervenor-legislature vigorously conducted both the district court trial and the appeal to the Third Circuit Court of Appeals. No other parties chose to defend the constitutionality of the New Jersey moment of silence law. (See Appellant's Jurisdictional Statement at p. 5).

On January 14, 1986, when the 202d legislature assembled, Messrs. Karcher

and Orechio were succeeded by Chuck Hardwick and John Russo as Speaker of the General Assembly and President of the Senate respectively. By letter dated April 21, 1986, Mr. Hardwick, on behalf of the General Assembly, directed that the instant appeal be withdrawn. (See letter of May 6, 1986, from Mr. Robertson, counsel who filed the Jurisdictional Statement, to the Clerk of the Court). (R. App. 1a). A similar step was taken by Mr. Russo on behalf of the Senate on April 28, 1986. Id. Messrs. Hardwick and Russo, as successors in office to parties named in their official capacities as litigants, are automatically substituted as the representatives of the intervening party in this litigation. Supreme Court Rule 40(3); Stern & Gressman, "Supreme Court

Practice" (5th ed. 1978), #18.5, p. 899; Kentucky v. Graham, supra, 105 S. Ct. at 3105 n.11, 87 L.Ed.2d at 121 n. 11. By a joint statement issued April 28, 1986, Messrs. Hardwick and Russo explained that "careful consideration of financial, constitutional and practical" factors had prompted the decision to withdraw the appeal. (R. App. 10a). Mr. Hardwick explained further, in a letter to the New Jersey ACLU Director dated May 2, 1986, that the "questionable value" of the moment of silence as an educational exercise also influenced the decision to withdraw the appeal. (R. App. 8a).

The only authorized intervenor -- the New Jersey legislature -- having withdrawn its appeal, there is no longer a case or controversy before this

Court. See Diamond v. Charles, 106 S.Ct. 1697, 1703-04 90 L.Ed. 2d 58-59 (1986). Any suggestion that Mr. Karcher could now invoke standing as a current member of the legislature must be rejected. This Court has indicated unmistakably that a party who has litigated in one capacity (such as in an official capacity as speaker of an assembly) cannot alter that status at an advanced appellate level in order to preserve a constitutional issue which the real party in interest (the N.J. legislature) has determined to drop. Thus, in Bender v. Williamsport Area School District, 106 S.Ct. 1326, 1332, 89 L.Ed. 2d 501, 512 (1986), a school board member who had been sued in his official capacity could not launch an appeal in his personal capacity either

as an individual board member or parent. The Court explained:

> The fact that [the board member] was sued in his official capacity does not give him standing to appeal in his individual capacity. Acts performed by the same person in two different capacities are generally treated as the transactions of two different legal personages. Id. at 1332 n. 6., 89 L.Ed. at 512 n. 6.

A person litigating in one legal capacity cannot acquire standing in another capacity without first securing permission from the trial court. Id. at 1334-35, 89 L.Ed. 2d at 515.

There are additional reasons why Mr. Karcher cannot prosecute this appeal as an individual legislator. Where, as here, a collective body (a legislature)

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a right to appeal. Bender, supra, 106 S.Ct. at 1333, 89 L.Ed. 2d at 513; see Smuck v. Hobson, 408 F.2d 175, 177-78 (D.C. Cir. 1969). "[M]embers of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." Bender, supra, 106 S.Ct. at 1333, 89 L.Ed. 2d at 513. This principle is particularly apt where a state legislative enactment is in question. As this Court has explained:

> [T]he power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of a State. . . . Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' [necessary] . . . in defending the standards embodied in that code." Diamond v. Charles, supra, 106 S.Ct. at 1705, 90 L.Ed. 2d at 59.

This last quotation from Diamond raises the final bar to an individual

legislator's appeal -- absence of a sufficient personal stake in the outcome to confer standing. An individual legislator ordinarily has no standing in federal court to litigate the constitutionality of a measure adopted by the collective body. Korioth v. Briscoe, 523 F.2d 1271, 1277-78 (5th Cir. 1975). This is so whether the individual legislator is convinced that the statute is unconstitutional and seeks to attack it, or whether the legislator seeks to defend the measure against constitutional attack. See Poovey v. Edmisten, 526 F. Supp. 759, 765 (E.D.N.C. 1981). An individual legislator cannot litigate his constitutional faith in a legislative measure. It is up to the legislature to determine when to defend its own interests.

Any suggestion that Mr. Karcher retains standing to appeal as a representative of the 200th Legislature which terminated at the end of 1983,[1] is totally divorced from reality. As the hearing on intervention before the district court made plain, the legislature was admitted as a party in order to defend the moment of silence law. Neither then nor at any other moment in the protracted course of this litigation was there any suggestion that a prior legislature rather then the current legislature was acting as intervenor. This was true, for example, during the appeal in the Third Circuit

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1. There is a hint to this effect in Mr. Karcher's letter of April 29, 1986, to Mr. Robertson, the counsel who filed the jurisdictional statement in the instant matter. (R. App. 6a).

which was conducted during the term of the 201st Legislature.

It is self-evident that a decision whether to appeal a judgment declaring a state enactment unconstitutional is a matter of policy for the current legislature. Acquiescence in a declaration of unconstitutionality means that a legislative measure will not be currently and prospectively enforced. The primary impact of a decision whether to appeal is on the current constituency of the current legislature. This is true regarding assessment of the many considerations which go into a decision whether to appeal a judgment -- importance of maintaining a statute's force, economic costs to be incurred in the appeal, possible changes in the will of the electorate, and the possibility of

alternative means to accomplish whatever legitimate objectives are at stake. The current legislature, and not the 200th legislature which expired over 2 years ago, is the appropriate body to make a decision whether to appeal. See Estate of Thornton v. Caldor, 105 S.Ct. 2914, 2917 n.7, 89 L.Ed. 2d 557, 562, n. 7 (1985) (1984 Connecticut legislature allowed to intervene to defend a 1976 law). The legislative will, as determined by the duly elected representatives of the legislature's two houses, is to withdraw the current appeal.

Even if there were a case or controversy present in this matter, the internal disarray within the state legislative body would make this case inappropriate for the delicate matter of constitutional adjudication. Avoidance

of unnecessary constitutional adjudication is a basic precept of constitutional jurisprudence.

B. BECAUSE THE DISTRICT COURT ADHERED TO ESTABLISHMENT CLAUSE JURISPRUDENCE, AND BECAUSE TWO COURTS HAVE DETERMINED, BASED ON AN EXTENSIVE TRIAL RECORD, THAT NEW JERSEY'S MOMENT OF SILENCE LAW LACKED ANY REAL SECULAR PURPOSE, THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

This case -- a challenge to the constitutionality of a moment of silence law -- is governed by Wallace v. Jaffree, 105 S. Ct. 2479, 86 L.Ed. 2d 29 (1985). Respondents submit that the lower courts merely applied the teachings of Jaffree to reach a conclusion similar to this Court's conclusion there. Most of Appellant's claims relate to minor evidentiary matters -- e.g., admissibility of hearsay testimony, or relevance of bills adopted by prior legislators -- which do

not warrant Supreme Court attention. Jaffree was decided less than one and a half years ago. There is nothing in the instant case which requires Supreme Court treatment of the "moment of silence" issue so soon after Jaffree's guidance was made available.

Appellant's jurisdictional statement purports to raise "fundamental errors" by the lower courts in applying this Court's Establishment Clause jurisprudence. (See Juris. Statement at pp. 10-11). These accusations are based on Appellant's misconceptions about that jurisprudence. Respondents will undertake here, in brief, to show that neither the district court nor court of appeals deviated from established First Amendment doctrine. Thus, there is no need for plenary consideration of this appeal.

Appellant principally castigates the district court for examining the purpose of New Jersey's moment of silence law despite "a plausible secular purpose" asserted by the legislature. Id. at 19, 23. The legislature did assert during the course of this litigation that the secular purpose of the New Jersey moment of silence law was to create a transition period to calm students at the start of the school day. (See Appellant's App. 10a, 82a). But it is important to note that this avowed secular purpose -- the only one advanced by the legislature -- was propounded for the first time after this litigation commenced. The district court found:

> The purpose of the Bill, urged at the trial, to provide a transition from non-school life to school work is an after-the-fact rationalization and not the real purpose of the Bill.

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> The attempt to develop rational support for the thesis that a minute of silence served a transitional purpose commenced after this law suit was underway rather than before the Bill was adopted. (Appellant's App. 87a-881.)

Appellant errs grievously in thinking that a neutrally worded moment of silence statute[2] is entirely immune from judicial inquiry about legislative purpose to promote religion. This Court

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2. The New Jersey statute does not contain the word "prayer." Yet, as noted, the only secular purpose asserted by the legislature in defending New Jersey's moment of silence law -- a transition period -- does not appear unambiguously on the face of the statute. That purpose was articulated and defended only during the course of the instant litigation, and not before. Moreover, as plaintiffs established at trial, organized group silence and individual "contemplation" -- both of which emerge from the face of N.J.S.A. 18A:36-4 -- constitute traditional religious exercises for some religious sects. Thus, it is arguable that the moment of silence law is not neutral on its face, in terms of religion. In any event, the law does not contain on its face the secular purpose later propounded by the legislature.

has established that pursuant to the "purpose prong" of the tripartite test of Lemon v. Kurtzman, 403 U.S. 602 (1971), a court may examine whether an enactment is preeminently intended to promote religion. In Wallace v. Jaffree, 105 S.Ct. 2479, 86 L.Ed. 2d 29 (1985), Justice Stevens' opinion for the Court explained:

> In applying the purpose test, it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion. Id. at 2490.

Justice O'Connor fixed the same standard in her concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355 (1984):

> The proper inquiry under the purpose prong of Lemon . . . is whether the government intends to convey a message of endorsement or disapproval of religion. Id. at 690, 104 S.Ct. at 1368.

Legislative avowal of a secular purpose cannot be allowed to foreclose further judicial inquiry, as it must always be available to a claimant to demonstrate that the avowed purpose is a sham. Wallace v. Jaffree, supra, 105 S. Ct. at 2494, 86 L.Ed. 2d at 48 (Powell, J. concurring); id. at 2500, 86 L.Ed. 2d at 55 (O'Connor, J. concurring). In Stone v. Graham, 449 U.S. 39, 55 (1980), for example, a state statute requiring posting of the Ten Commandments in classrooms specifically proferred a secular justification for the posting requirement. (Indeed, it is likely that the measure in fact had subsidiary secular objectives such as instilling the values of the Ten Commandments and illustrating their connection to our legal system). See Lynch v. Donnelly,

465 U.S. 668, 691, 79 L.Ed.2d 604, 621 (1984)(Justice O'Connor commenting on Stone). But Stone and many lower court opinions make clear that even explicit avowal of a secular purpose on the face of a statute could not shield the statute from scrutiny as to illicit legislative purpose. See, e.g., Karen B. v. Treen, 653 F.2d 897, 900-01 (5th Cir. 1981), aff'd mem. 455 U.S. 913 (1982); Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980); McLean v. Arkansas Bd. Educ., 529 F.Supp. 1255, 1263 (E.D. Ark. 1982). See also Epperson v. Arkansas, 393 U.S. 97 (1968).

In accord with the above-described jurisprudence, plaintiffs, in challenging New Jersey's moment of silence law, undertook to demonstrate that the only secular purpose propounded for the

measure -- a transition period between home and school -- was a sham. During a five day trial, they presented 13 witnesses, numerous affidavits, and scores of documents. Intervenor countered with its own witnesses and documents. After considering the various proofs submitted, the district court concluded that the legislature's purported secular justification was "pretextual in nature," and that the moment of silence bill had become, after passage, "a statute in search of a secular purpose." (Appellant's App. 91a). After reviewing the entire record, a majority of the Third Circuit Court of Appeals upheld the district court's finding that the statute lacked a secular purpose. (Appellant's App.

26a-27a)[3] In short, in examining the sham nature of the New Jersey legislature's avowed secular purpose, the district court simply implemented the approach of Wallace v. Jaffree, supra.

The remainder of Appellant's claims relate to the evidentiary base on which the district court made its findings about legislative purpose. The Jurisdictional Statement in this matter refers, inter alia, to an "errant inquiry into subjective legislator motivation," a "reliance on wholly inadmissable hearsay," and a second-guessing of "the wisdom of the New Jersey legislature" in the courts' rejection of the statute's purported secular purpose. (Juris. Statement at

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3. The "clearly erroneous" standard of review employed by the Court of Appeals and attacked by the Appellant will be discussed infra, at Point III.

10-11). Yet, the trial court made its findings about pretext only after consideration of a wide array of proofs appropriate to the difficult task of assessing legislative purpose. Cf. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266-68 (1977). Jaffree confirmed that a variety of proofs may properly be examined in the course of assessing actual legislative purpose. See Wallace v. Jaffree, supra., 105 S.Ct. at 2499, 86 L.Ed. 2d 54-55 (O'Connor, J. concurring).[4]

Respondents are sensitive to the absence of a full record before the

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4. This question [whether the state has attempted to encourage use of a moment of silence for prayer] cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion. Id.

Court. We will briefly describe and analyse the kinds of proofs submitted and relied upon by the trial court. Citations will be to the district court opinion, as contained in Appellant's Appendix. This brief analysis will establish that the Appellant's attack on the evidentiary base of the trial court's findings does not raise substantial constitutional issues meriting plenary review.

1. Content of Legislative Proceedings and Legislators' Statements

Plaintiffs presented several witnesses who testified about the content of legislative hearings and legislative floor debates leading up to the passage of the moment of silence law. (See Appellant's App. 68a-70a). This eyewitness testimony included

quotations of contemporaneous statements by certain members of the legislature.[5] Such testimony was necessitated by the fact that the New Jersey legislature does not maintain a transcript either of committee hearings or of floor debates. (Appellant's App. 14a).

Appellant's Jurisdictional Statement objects strenuously to the district court's inquiry into "subjective motivation of some legislators." (Juris. Statement at 14). Yet numerous decisions have endorsed the use of

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5. While the intervenor-legislature objected strenuously to the "hearsay" nature of this testimony, it presented no testimony or proof which would contradict or even question the accuracy of the plaintiffs' version of the legislative committee hearings or floor debates.

legislators' statements as one element of proof in establishing illicit purpose. See Wallace v. Jaffree, supra, 105 S.Ct. at 2500, 86 L.Ed. 2d at 55; Larson v. Valente, 456 U.S. 228, 254-55 (1982); Busbee v. Smith, 549 F.Supp. 494, 516-17, aff'd, 459 U.S. 1166, 74 L.Ed.2d 1010 (1983); Arlington Heights, supra, 429 U.S. at 268; Karen B. v. Treen, supra; McLean v. Arkansas, supra. Legislators' statements are especially useful where, as here, they are made contemporaneous with the legislative process. Such statements, as well as descriptions of the overall content of the debates, are probative of the arguments and information upon which the legislative body acted. These elements, in turn, are useful in assessing legislative purpose. See

Raveson, "Unmasking the Motives of Government Decisionmakers," 63 No.Car. L. Rev. 879, 975-83 (1986).

The district court used this eyewitness testimony about the legislative process precisely for such a function. That is, testimony that the hearings and debates on N.J.S.A. 18A:36-4 were dominated by notions of public prayer was used as one element of proof in the court's ultimate conclusions about legislative purpose. (See Appellant's App. 90a). The same testimony also demonstrated that the legislature had never received any input

(from educators or any other source) indicating that a "transition period" was needed or would be useful in New Jersey schools.[6]

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6. Appellant accuses the district court of erecting "a new requirement that in order for the court to accept the plausible secular purpose identified by the legislature at trial, that purpose must be shown to have been specifically and explicitly discussed and considered by the legislature." (Juris. Statement at 14). The court set down no such requirement. The court merely, as one element of proof, drew the inference that a total failure to consider a statute's purported secular purpose during committee hearings and debates leading up to passage lends some support to the conclusion that the purported secular purpose did not in fact underlie the legislative action.

2. Experts' Testimony about Pedagogical Value

Among the proofs submitted at trial was expert testimony (by educational psychologists drawn from graduate schools of education) about the disutility of a minute of silence as a transition period. (See Appellant's App. at 84a, 88a). In addition, two veteran school superintendents testified, as well as representatives of the N.J. Education Association (a union representing 84,000 public school teachers) and the N.J. School Board Association (representing 611 school districts). (See id at 71a, 76a-77a).

This testimony was not submitted or used merely for the purpose of questioning the wisdom of the legislature's adoption of a moment of

silence law. The object was to show that the law in its adopted form -- applicable in every public school classroom in every elementary and secondary school in the State -- not only lacked pedagogical or educational value, but would be harmful in some instances. That is, the gap between the moment of silence law as constructed and any possible educational value as a "transition period" was so great as to indicate (along with other proofs) the pretextual nature of the "transition period" rationale. (See Id. at 88a district court finding that a minute of silence would be difficult or detrimental for very young pupils and handicapped pupils). The same expert testimony was also aimed at showing that any purported educational objectives (re

a transition period) could be obtained by other devices or exercises in which prayer would not be implicated. In short, a reasonable fact finder could use the considerable gap between educational utility and the adopted version of the moment of silence law as one element of proof belying the legislature's purported educational justification.

3. Prior Legislative Measures Relating to Silence or Meditation

Another element of proof concerned bills (relating to silence or meditation in the schools) introduced in the New Jersey legislature during the period 1968 to 1982. A number of these prior bills had been adopted by the legislature and vetoed by the governor

-- each time on the basis that the law was unconstitutional and/or lacked educational utility. (See Id. at 10a-11a, 67a). Appellant condemns the use of such an element of proof. (Jurisdictional Statement 14, 25).

These prior legislative measures were introduced as evidence in order to develop the historical background for adoption of the 1982 moment of silence law. The background and origins of legislation can provide a useful link in identifying legislative purpose. See, e.g. Epperson v. Arkansas, 393 U.S. 97, 108 (1968). In the instant case, that background tended to show repeated efforts by pro-prayer forces to adopt measures, including moments of contemplation or meditation, in order to inject prayer into the school day. Such

background was relevant, particularly in addressing questions about the intendment or common understanding of legislative terms like "introspection" and "contemplation" as used in New Jersey's 1982 moment of silence measure. Furthermore, where a clear institutional pattern is established over time, it is even possible to attribute an ongoing institutional purpose to a body whose membership has changed. See Raveson, "Unmasking the Motives of Government Decisionmakers," supra, 63 No.Car. L. Rev. at 966 n.509. Of course, the prior bills were only one element within a network of proofs used by the district court.

The district court's finding about religious purpose was grounded on numerous elements highly relevant to a determination of legislative purpose:

* a dominant focus on religious objectives during the committee hearings and legislative debates;

* contemporaneous statements by some legislators, including the principal sponsor of the legislation, betraying a religious purpose behind the legislation;

* absence of any showing that "transition period" was a concern in the public schools of New Jersey;

* absence of any input to the legislature from educational sources indicating that a "transition period" would be educationally useful;

* information communicated to the legislature by professional groups, intimately involved in public education, that a moment of silence law had no function other than to advance prayer;

* expert testimony that the moment of silence, as structured, would be of marginal educational utility at best, and would be counter-productive as to significant elements in the student population. (See Appellant's App. at 87a-88a).

With all these types of proof as part of the record, the district court

concluded that "the circumstances of the adoption of this particular bill point inescapably to an essentially religious purpose." Id. at 92a. The district court's approach to the "purpose prong" of Lemon v. Kurtzman, supra, was fully consistent with the jurisprudence charted in Wallace v. Jaffree, supra. Jaffree indicated that some moment of silence laws would be upheld, and some would be struck down, depending on the legislative history and other circumstances surrounding the passage of each measure. The district court used the approach signalled by Jaffree in concluding that New Jersey's law, like Alabama's, should be struck down. Omission of the word "prayer" from New Jersey's statute was ultimately deemed a "cosmetic" difference by the court.

(Appellant's App. at 93a). Cf. Epperson v. Arkansas, 393 U.S. 97, 109 (1968). On review of the entire extensive record, a majority of the Court of Appeals upheld the conclusion that New Jersey's law lacked a real secular purpose. In sum, the claims raised in the Jurisdictional Statement with regard to the trial court's findings of legislative purpose are so unsubstantial as not to warrant further argument.

C. A JUDICIAL FINDING OF NO SECULAR PURPOSE IS A FACTUAL FINDING SUBJECT TO THE CLEARLY ERRONEOUS STANDARD OF REVIEW FIXED BY RULE 52(a), AND THE JURISPRUDENCE OF BOSE CORPORATION v. CONSUMERS UNION DOES NOT DICTATE OTHERWISE.

The Jurisdictional Statement in this matter asserts that a finding of religious purpose (or absence of a secular purpose) represents an "ultimate constitutional fact." (Juris. Statement at 25). Appellant then contends that Bose Corp. v. Consumers' Union, 466 U.S. 485, 80 L.Ed.2d 502 (1984) establishes that "questions of constitutional fact compel an appellate court's de novo review of the record." (Juris. Statement at 28). Respondents submit that this contention is so far removed from the appropriate scope of the Bose doctrine as not to warrant plenary consideration.

Bose holds that a finding of "actual malice" in a libel proceeding must be subjected to independent appellate review. While Bose cannot be confined to libel cases, there is considerable indication in the opinion that its teaching is limited principally to the free speech area. Justice Stevens' opinion for the Court explains that independent appellate review of a record has been customary in order to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." Bose, supra, 466 U.S. at 499, 80 L.Ed.2d at 515. To support that conclusion, Justice Stevens relies on precedents treating fighting words, incitement to riot, contempt of court, and obscenity. He then concludes:

> In such cases, the Court has regularly conducted an independent review of the record * * * to be sure that the speech in question actually falls within the unprotected category * * * in an effort to ensure that protected expression will not be inhibited." Id. at 505, 80 L.Ed. 2d at 519.

Certainly, the vast majority of lower court decisions applying Bose relate to free speech issues in which this Court's historical solicitude for the safeguarding of protected speech is implicated. See, e.g., Herbert v. Lando, 781 F.2d 298 (2d Cir. 1986); Marcone v. Penthouse Magazine, 754 F.2d 1072 (3d Cir. 1985); Bartimo v. Horsemen's Benevolent Ass'n, 771 F.2d 894 (5th Cir. 1985); Lebron v. Washington Metropolitan

Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984).[7]

Even if Bose's approach of independent appellate review is not confined to free speech issues, its reach cannot be extended to a finding of illicit legislative purpose. As a first principle, it is important to note that labelling an issue as "a constitutional fact" or "an ultimate fact" does not determine the appropriate scope of review. Rather, the issue is one of

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7. Indeed, it is not yet clear whether Bose even applies to all mixed questions of law and fact concerning the application of free speech principles. See Renton v. Playtime Theaters, 106 S. Ct. 925, 932, 89 L.Ed.2d 29, 42 n.3 (1986)(reserving this issue for future consideration). See also FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 41 n.3 (D.C. Cir. 1985)(refusing to apply Bose to an issue of false and deceptive advertising).

proper allocation of judicial responsibility. See Miller v. Fenton, 106 S.Ct. 455, 451-52, 88 L.Ed.2d 405, 413 (1985); Monaghan, "Constitutional Fact Review," 85 Colum. L. Rev. 229, 234-39 (1985). "An issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." Miller v. Fenton, supra, 106 S.Ct. at 451, 88 L.Ed.2d at 413.

It is true that where certain constitutional rules are applied to factual situations there is a need for independent appellate review in order to safeguard constitutional norms. This is so, for example, where application of a constitutional rule entails weighing the underlying constitutional interests against countervailing governmental

interests. Thus, in "actual malice" libel cases, a court in fixing the degree of fault or recklessness which can sustain a libel judgment implicitly weighs free speech interests against reputational interests. Such a determination involves the evolution and elaboration of a constitutional norm and therefore warrants independent judicial review. See Monaghan, "Constitutional Fact Review," supra, 85 Colum. L. Rev. at 236, 242, 264-68. That is, the content of the constitutional rule concerning "actual malice" is given meaning through an evolutionary process of common law adjudication. See Bose, supra, 466 U.S. at 501-502, 80 L.Ed.2d at 517.

Another area where the fluidity of a constitutional norm has warranted independent appellate review is

"voluntariness" of confessions. See Miller v. Fenton, supra, 106 S.Ct. at 447, 452, 88 L.Ed.2d at 408, 413. A major issue in forced confession cases is whether any particular interrogation technique is "so offensive to a civilized system of justice" as to run afoul of due process limitations. Id. at 449, 88 L.Ed. 2d at 410. Such an issue obviously involves a continuous elaboration of a constitutional norm, and is therefore the kind of substantive constitutional issue whose resolution dictates independent appellate review. (See Monaghan, supra, 85 Colum. L. Rev. at 264-71, for a more complete description of the kinds of constitutional principles whose application in the trial court warrants independent judicial review.)

In the instant moment of silence case, the substantive issue on which review is sought does not implicate the kind of fluid constitutional norm which dictates independent appellate review. Wallace v. Jaffree fixes the relevant norm in administering the "purpose prong" of establishment clause jurisprudence. Purposeful governmental conduct is the key. A legislative measure will be invalidated if it is shown that it lacks a genuine secular purpose, or if "government's actual purpose is to endorse or disapprove of religion." Jaffree, supra, 105 S.Ct. at 2490, 88 L.Ed. 2d at 43.

Actual legislative purpose, in turn, is a factual question whose resolution hinges on resolution of various subsidiary facts. A district court finding on legislative purpose ought

therefore to be subject to the standard of review set down in Rule 52(a). This is so whether the factual finding is grounded on credibility of witnesses, documentary evidence, or inferences from subsidiary facts. The rationale for the "clearly erroneous" standard is still applicable. See Anderson v. Bessemer City, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985); Wright, Federal Courts (4th ed. 1983), #96, pp. 648-49. That illicit legislative purpose may be an "ultimate fact" which incidentally determines the outcome of a particular constitutional litigation does not affect its factual character. See Miller v. Fenton, supra, 106 S.Ct. at 451, 88 L.Ed.2d at 413.

This Court has indicated that district court findings concerning illicit purpose of government

decision-makers -- for example, purposeful racial discrimination -- are subject to the "clearly erroneous" scope of review. In Rogers v. Lodge, 458 U.S. 613, 73 L.Ed.2d 1012 (1982), the "clearly erroneous" standard was applied to a district court finding that an at-large election system had been maintained by the governmental body for invidious purposes. Id. at 622-23, 73 L.Ed.2d at 1021. That standard was applied not just to subsidiary questions of fact, but also to the ultimate factual inference of purposeful discrimination. Id. at 623-24, 73 L.Ed. 2d at 1021-22. See also Dayton Board of Education v. Brinkman, 443 U.S. 526, 534, 540, 61 L.Ed.2d 720, 731, 735 n.12 (1979); Monaghan, supra, 85 Colum. L. Rev. at 265.

The "clearly erroneous" standard of Rule 52(a) has also been applied by this Court to findings of purposeful discrimination made pursuant to Title VII of the Civil Rights Act of 1964. Pullman-Standard v. Swint, 456 U.S. 273, 72 L.Ed.2d 66 (1982) held that intentional discrimination (regarding establishment of a seniority system) is a pure question of fact subject to Rule 52(a). The Court commented:

> Treating issues of intent as factual matters for the trier of fact is commonplace. In Dayton Board of Education v. Brinkman * * * , the principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. We recognized that issue as essentially factual, subject to the clearly erroneous rule. Pullman-Standard, supra, 456 U.S. at 288, 456 U.S. at 288, 72 L.Ed.2d at 79.

In Anderson v. Bessemer City, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), this Court mandated a "clearly erroneous" standard of review for a judicial determination that a government agency had engaged in purposeful discrimination in making a hiring decision. Anderson indicated that the court of appeals should have applied a deferential standard of review both to the district court's findings about subsidiary facts and about the ultimate question of purposeful discrimination, 105 S.Ct. at 1513-15, 84 L.Ed.2d at 530-32. Justice White's opinion commented:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's effort in the court of appeals would very likely contribute only negligibly to

the accuracy of fact determination at a huge cost in diversion of judicial resources, 105 S.Ct. at 1512, 84 L.Ed.2d at 529.

The same considerations dictating application of a "clearly erroneous" standard to factual findings of racially discriminatory purpose dictate application of an identical standard to findings of religious purpose. Both areas involve the application of a settled constitutional norm to disputed facts -- grist for the mill of federal district courts. There is no precedent mandating a searching appellate review of findings regarding religious purpose. In short, the issue of application of the Bose standard to the purpose prong of Lemon v. Kurtzman does not merit plenary consideration.

CONCLUSION

The instant appeal should be dismissed for want of jurisdiction -- there being no party before the Court with standing to appeal. Alternatively, the judgment upholding the district court's finding that New Jersey's 1982 moment of silence law is unconstitutional should be summarily affirmed.

Respectfully submitted,

PELLETTIERI, RABSTEIN AND ALTMAN
Attorneys for Appellees

RICHARD M. ALTMAN

DATE: July 25, 1986

Hannoch Weismann letter to the Clerk of the Supreme Court of the United States.

May 6, 1986

Express Mail

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

Re: Docket No. 85-1551, October Term, 1985
Alan J. Karcher, et al. vs.
Jeffrey May, et al.

Dear Mr. Spaniol:

In connection with the above-captioned matter, counsel for the appellants respectfully calls to the Court's attention letters dated April 21, 1986 and April 29, 1986, from the Honorable Charles Hardwick, the Speaker of the 202nd New Jersey General Assembly, and from Leon Sokol, counsel to the President of the 202nd New Jersey Senate (the Honorable John Russo), to the undersigned directing that the appeal be withdrawn on behalf of both the 202nd New Jersey General Assembly and the 202nd New Jersey Senate of which Mr. Hardwick and Mr. Russo are the presiding officers.

Copies of Mr. Hardwick's and Mr. Sokol's letter on behalf of Mr. Russo are enclosed.

Counsel has also received a letter from the Honorable Alan J. Karcher, Minority Leader of the 202nd New Jersey General Assembly and the Speaker of the 200th New Jersey General Assembly -- the body that originated the legislation which is the subject matter of the instant appeal. Mr. Karcher's letter indicates that it is his position that the presiding officer of the 202nd Legislature are not in fact my clients in this matter and that it is not his desire to have the instant appeal abate.

A copy of Mr. Karcher's letter is also enclosed.

In accordance with Mr. Hardwick's and Mrs. Russo's (through Mr. Sokol) directives, I respectfully request that their letters be brought to the Court's attention and that the Clerk's file be marked to indicate that the Assembly and the Senate of the current (202nd) New Jersey Legislature do not join in and are not appellants in this matter; and if deemed so withdraw from the appeal.

In response to Mr. Karcher's communication, the undersigned counsel is in the process of researching and, if appropriate, preparing a motion to effect whatever change may be necessitated by reason of Mr. Hardwick's and Mr. Russo's recent communications. Cf. Bender v. Williamsport, ___ U.S. ___, 54 U.S. L.W. 4307 (March 25, 1986).

By a copy of this letter, I am advising counsel of record for the respondents of Mr. Hardwick's, Mr.

Sokol's and Mr. Karcher's communications.

I respectfully request that the foregoing letter and its enclosures be appropriately communicated to the Court for whatever additional guidance or directives it believes are warranted under the circumstances.

Respectfully yours,

WILLIAM W. ROBERTSON

WWR/jlb
Encs.

cc: Richard M. Altman, Esq.
Jack D. Novik, Esq.
Alfred A. Ramey, Jr., Esq.
Bradley S. Brewster, Esq. (for Speaker Charles Hardwick)
Leon J. Sokol, Esq. (for President John F. Russo)
Alan J. Karcher, Esq.
Lawrence T. Marinari, Esq.
Rex E. Lee, Esq.

Letter from Chuck Hardwick, Speaker of the New Jersey Assembly, directing withdrawl of appeal from May v. Cooperman.

April 21, 1986

William W. Robertson, Esquire
Hannoch Weissman
4 Becker Farm Road
Roseland, NJ 07068-3788

Dear Mr. Robertson:

Please let this letter advise you that on behalf of the New Jersey General Assembly, I hereby direct you to immediately withdraw the appeal to the United States Supreme Court filed by you on behalf of the Legislature in the matter of May v. Cooperman.

You are authorized to take all necessary steps to accomplish this directive.

Please copy me on all correspondence to the Court.

Sincerely yours,

Chuck Hardwick

CH/BB/bh

Letter withdrawing appeal of May v. Cooperman from Leon J. Sokol on behalf of John Russo, President of the Senate.

April 29, 1986

William Robertson, Esq.
Hannoch Weissman, Esqs.
4 Beck Farm Road
Roseland, New Jersey 07068

Re: May v. Cooperman

Dear Bill:

Confirming our telephone conversation of April 28th, I have been authorized by Senator Russo to advise you that effective this date, you are to communicate on his behalf with the U.S. Supreme Court, withdrawing the appeal now pending in the aforementioned action. Senator Russo, therefore, joins with Speaker Hardwick in the communication the Speaker previously sent to you giving identical instructions.

Sincerely,

LEON J. SOKOL

LJS/zs
CC: Senator John F. Russo
Speaker Charles Hardwick
Bradley Brewster
Kathy Crotty
Lawrence T. Marinari, Esq.

Alan Karcher letter to Appellant Attorneys.

April 29, 1986

William W. Robertson, Esq.
Hannoch Weisman, P. A.
4 Becker Farm Road
Roseland, New Jersey 07068-3788

Re: Karcher, et al vs. May et al

Dear Bill:

This will confirm my various conversations with you. I have seen the directive sent to you by Speaker Hardwick and Senate President Russo. I emphasize that they are the presiding officers of the 202nd Legislature and are not, in fact, your clients.

The legislative action in question was the product of the 200th Legislature and specifically was a bill which had the General Assembly as its house of origin. The 200th Legislature has an independent legal existence separate and apart from the 202nd Legislature and it is in fact that legislative body which is your client. As the presiding officer of the house of origin of the legislation in question, it is my position that I am the only valid representative of your client and it is not my wish nor do I

think the wish of the members of the 200th Legislature to abort this litigation which is now on the threshold of resolution by the United States Supreme Court.

You should further know that if, in fact, I may be incorrect in asserting that the 200th Legislature, i. e., your client, is not a separate legal entity from the 202nd Legislature, then it would be my intention to request that this matter be resolved by a full vote in both the Senate and Assembly so that each member of the Legislature might record themselves as to their position in reference to this matter.

Trusting this is satisfactory, I remain,

Yours very truly,

Alan J. Karcher
Minority Leader

AJK/mgp

Letter from Chuch Hardwick to Jeffrey Fogel.

May 2, 1986

Mr. Jeffrey Fogel
Director, ACLU
38 Walnut Street
Newark, NJ 07102

Dear Mr. Fogel:

As you may have recently read, Senate President John Russo and I have directed counsel to withdraw the appeal in the "Moment of Silence" lawsuit.

Our final decision is based on the belief that whether the United States Supreme Court rules the legislation unconstitutional or constitutional, the people of New Jersey will be losers if an appeal is pursued. If the statute is found to be unconstitutional, additional expense will have to be paid by our state's taxpayers. If on the other hand, our nation's highest court decides that the legislation requiring teachers to permit a moment of silence is constitutional, then our state's school children and teachers would be saddled with a practice of questionable value that may even be counterproductive to sound education practices.

For your information, I have enclosed a copy of the statement which was released by the Senate President and me.

Sincerely yours,

Chuck Hardwick

Enclosure
CH/BB/bh

Statement by Senate President John F. Russo and Assembly Speaker Chuck Hardwick concerning the Moment of Silence Case.

After careful consideration of the financial, constitutional and practical aspects of the Moment of Silence Case, we are directing counsel for the Assembly and Senate to inform the U.S. Supreme Court that the General Assembly no longer intends to appeal the decision.

If the statute is found to be unconstitutional, additional expense will have to be paid by our state's taxpayers. Legal fees associated with this case have reach approximately $230,000. In addition, the state is potentially liable for another $100,000 in legal fees for the parties who brought the suit.

Even though Mr. Robertson has offered to forego additional personal fees for the appeal, the additional out-of-pocket and plaintiff attorney fees incurred by another appeal would have to be paid by New Jersey taxpayers.

Accordingly, we have directed counsel for the Assembly and the Senate to inform Mr. Robertson that he should immediately withdraw the appeal on behalf of the General Assembly and Senate of New Jersey.

Chuck Hardwick John F. Russo

April 28, 1986

United States District Court
District of New Jersey
Civil No. 83-89

- - - - - - - - - - - - - - - -
JEFFREY MAY, et al,
:
Plaintiffs,
:
v.
:
DR. SAUL COOPERMAN,
et al, :
Defendants.
- - - - - - - - - - - - - - - -

January 18, 1983
Trenton, New Jersey

B E F O R E:

THE HONORABLE DICKINSON R. DEBEVOISE, U.S.D.J.

A P P E A R A N C E S:

PELLETTIERI, RABSTEIN & ALTMAN, ESQS.,
BY: ANNE MC HUGH, ESQ.,
For the Plaintiffs.

MARINARI & FARKAS, ESQS.,
BY: LAWRENCE T. MARINARI, ESQ.,
For Karcher, Orrechio, General Assembly and Senate

THE COURT: Good morning. Are we ready to proceed?

MS. MC HUGH: I am Anne McHugh on behalf of the plaintiffs from Pellettieri, Rabstein and Altman.

MR. MARINARI: I am from Marinari & Farkas. I am Lawrence Marinari for the General Assembly and Senate, the intervenors.

THE COURT: Who are you actually appearing for now?

MR. MARINARI: I am appearing for both the presiding offiers of the House and New Jersey Senate and New Jersey General Assembly.

THE COURT: Have you formally intervened?

MR. MARINARI: I was about to file the motion returnable today, but I was told by your clerk that you wanted a short time limit motion, and you would prefer to have it at some later time.

THE COURT: I thought we could do it right now.

MR. MARINARI: I have the consent of everybody else. I would move on behalf of Alan Karcher and Carmen A. Orrechio as presiding officers of the New Jersey General Assembly and Senate to be made a party, direct defendant in this matter. I have consulted with all respective parties presently in the case, and they have consented to my appearance.

THE COURT: So they would be intervening, and you would be representing them?

MR. MARINARI: That is correct.

THE COURT: Mrs. McHugh, any objection to that?

MS. MC HUGH: Judge, on behalf of the plaintiffs, I have no objection aside from the fact, and this is a

point of clarification that the Court can give to us. Mr. Marinari and I have discussions as to who he represents and how he regards his role in this litigation.

I just want to be certain that it is the Assembly and the Senate that are entities that he represents, and for example if discovery entails depositions of various Senators and/or Assembly persons that Mr. Marinari would consider them parties, respective members of the Legislature and would produce them upon a notice to produce for discovery. That sort of thing, and that it is not Mr. Karcher and Mr. Orrechio that are his clients, but the Legislature and its various members.

THE COURT: Well, I didn't understand you to say that.

MR. MARINARI: I didn't, your Honor.

THE COURT: So I think it is just those two individuals. Would they have standing as such, as individuals?

MR. MARINARI: As the presiding offiers of both houses, they are empowered by the rules of both houses to represent the House in ligitation.

THE COURT: They are in a representative capacity?

MR. MARINARI: That is correct.

THE COURT: Then maybe it would follow that the members of the two houses would be subject to deposition on notice if they are subpoenaed.

MR. MARINARI: I will cooperate with Mrs. McHugh every way I can so anyone she requests to depose is available for deposition. I can't guarantee all 120 people will abide by my request, and she has the rules of court that would enable her to compel that if

necessary, and at that point I would make a decision whether I would invoke any privileges they may have.

THE COURT: I hope you won't need 120.

MS. MC HUGH: I don't envision that, but there are indications, and I don't know the ruling of the Court. I would like to brief the issue. I don't thinks Messrs. Karcher and Orrechio are proper parties. I think it is the Legislature as a whole, separate entities.

MR. MARINARI: The institution is coming in as an institution. I can't come in for each of the 120 individuals directly. I have not polled each one of them.

THE COURT: You say there is a rule which provides the Speaker of each House --

MR. MARINARI: It is the presiding officer of each House and in charge of all administrative duties, and from that we have been in numerous suits and have cooperated with counsel anytime they want a deposition. I don't envision this to be a problem, your Honor.

THE COURT: I don't either. What we want is a presence in some form or other to advance that issue. I think it is important to have somebody enthusiastically in support of this statute as party to this action.

So I will grant the motion for intervention for Mr. Karcher and Mr. Orrechio in their capacities as Speakers of the respective Houses, and what the implications as far as that position is I won't decide now, but I am assuming the parties can work that out, and it won't come to any formal

difficulty. If it does, we can resolve the matter.

MS. MC HUGH: Could I be heard? One further point though. For example, there are a lot of statements that have been made by various members of the Legislature. Would they be considered admissions? I would consider them admissions against a party. That would be a very significant ruling, I think, and that wouldn't be --

THE COURT: That is an evidential ruling.

MS. MC HUGH: That is right, Judge, but if it is the Legislature, it is not intervening as a whole, I see them as General Motors Corporation and the various members of the Legislature making up this entity and in the same way an admission by an employee of General Motors would be an admission

against General Motors, similarly that would apply with equal force to the Legislature. But if they are coming in just as Carmen Orrechio and Alan Karcher, that is a different entity.

THE COURT: Suppose they didn't mean to intervene? You would still hope to introduce the statements? You have the problem no matter what I do.

MS. MC HUGH: That is correct.

THE COURT: Suppose there was no intervention, would you say I could not admit those statements because they were not parties, and therefore would not be deemed to be admissions against interest.

MS. MC HUGH: No. There would be another basis.

THE COURT: Let's rely on this other basis at this point. It doesn't make a difference whether they are

parties or not. I am confident one way or the other what the Legislature said in support of the statute will be admissible, and whether they are formally parties to the action or not parties to the act, those statements are evidence of what the legislative purpose was in adopting the statute. That is how I would view it right now. It doesn't make a difference whether the legislature is a party to the action or not a party to the action.

MS. MC HUGH: Fine. That is the Court's ruling. That is my primary concern.

THE COURT: I don't see that affects the intervention motion because you would prefer to have somebody else intervene. It is not a reason for not permitting these people to intervene.

MS. MC HUGH: I do think the General Assembly and Senate are proper parties and can be represented by Orrechio and Karcher, but those entities --

MR. MARINARI: That is who I am representing. The order says Alan J. Karcher in representative capacity as Speaker of the New Jersey General Assembly, the New Jersey General Assembly and the same for the Senate and its body.

THE COURT: You have an order there?

MR. MARINARI: Yes, I do.

THE COURT: Hand it up. See what we are doing. Maybe that will solve Mrs. McHugh's problems.

It seems to me this brings everybody in.

MS. MC HUGH: I have no objection.

THE COURT: Let me read what the operative language of the order is. "It is ordered that Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly, the New Jersey General Assembly, Carmen A. Orrechio in his representative capacity as President of the New Jersey Senate and the New Jersey Senate be permitted to intervene as direct party defendants in Civil Action 83-89." You have everybody on that order.

MS. MC HUGH: That is fine. Then I have no objection.

THE COURT: Why don't I just sign the order now and then we will have some genuine opponents for the plaintiff.

Then I will file this order and that resolves that matter.

I gather the parties have agreed to a continuation of the restraints.

MS. MC HUGH: That is right, Judge.

THE COURT: And adjournment of the matter.

MR. MARINARI: That is correct, your Honor.

THE COURT: A formal order?

MS. MC HUGH: I have the original order as well as the consent order regarding discovery in this matter.

THE COURT: I will look at the consent order regarding discovery first. There is one blank. All depositions are to take place at blank, New Jersey.

MS. MC HUGH: We couldn't resolve that, and we did this morning. Either Newark or Trenton is fine.

THE COURT: Newark or Trenton, I will put in there.

MS. MC HUGH: That is correct.

THE COURT: At whose choice? Whose election?

MS. MC HUGH: At the election of the deponent.

THE COURT: That is the person whose deposition is being taken?

MS. MC HUGH: That is correct, Judge.

MR. MARINARI: That is correct.

THE COURT: So the place is to be at the election of the deponent.

We will set this down for hearing on preliminary and permanent injunctive relief on February 24, on the 24th day of February. Then I take it there is agreement the matter will be consolidated, that is the application for the preliminary injunction will be consolidated with the final hearing?

MR. MARINARI: That is correct, your Honor.

MS. MC HUGH: That is correct.

THE COURT: I won't write that in here, but that is what is understood, and there are places on here for each of your signatures so I can give that back for the moment.

The language of the consent order, I am not sure it says exactly what you mean. It says "ordered that the temporary restraints entered by this Court on January 10, 1983, are continued." Technically that means they are adjourned. You mean to remain in effect?

MS. MC HUGH: That is correct.

THE COURT: Until the date of final hearing or until February 24, I guess it would be.

MS. MC HUGH: Right, Judge.

MR. MARINARI: That is correct.

THE COURT: So I will just change that.

MR. MARINARI: Continue in effect.

THE COURT: Are to remain in effect. The order recites that the continuation of the restraints is with the consent of the attorneys for all of the parties. I take it one or the other of you have spoken to all counsel?

MS. MC HUGH: Yes, I did. I spoke to counsel for the respective defendants.

MR. MARINARI: I have no objection.

THE COURT: Well, I think it makes sense to consolidate the final hearing, and to take the time now to complete discovery. I would hope discovery could be compressed into that time. I should think it could.

MS. MC HUGH: That is the arrangement. I anticipate that we can. Apparently counsel for the other defen-

dants do not intend to engage in any discovery. We will notice them, of course.

THE COURT: Anything else we should take up?

MR. MARINARI: I don't believe so, your Honor.

MS. MC HUGH: That is it.

THE COURT: Thank you very much. There are some matters for you to sign.

Perhaps you ought to consent to the order on the restraints also. Both of you might just do that.

I will see you on the 23rd, not the 24th, and that will be in Newark.

MS. MC HUGH: 9:00 a.m.?

THE COURT: Let's make it 9:00 a.m. We will get started early, and maybe we can finish in one day.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALAN J. KARCHER, et al.

Appellants,

vs.

JEFFREY, MAY, individually, et al.

Appellees.

On Appeal from the United States
Court of Appeals For the Third Circuit

AFFIDAVIT OF SERVICE

STATE OF NEW JERSEY)
)
COUNTY OF MERCER)

Jane P. Maracani, of full age, being duly sworn, according to law, upon my oath, deposes and says:

1. I am employed by Pellettieri, Rabstein and Altman, attorneys for appellees in this case.

2. I did on this 25th day of July, 1986, mail three copies of the appellee's Motion to Dismiss or Affirm in the above captioned case, in envelopes properly addressed and first class postage prepaid, to counsel of record for all the appellants herein, as follows:

William W. Robertson
Hannoch Weisman
4 Becker Farm Road
Roseland, New Jersey 07068
Attorneys for Appellants
Alan J. Karcher, et al.

Jane P. Maracani
JANE P. MARACANI

Sworn to and subscribed to before me this 25th day of July, 1986.

NOTARY PUBLIC OF NEW JERSEY

Nancy M. Delgado
Notary Public of New Jersey
My Commission Expires Aug. 28, 1986